

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRANDON LIVINGSTON, A Minor,
by his Parents and Guardians,
Mark Livingston and Lorraine Livingston,
MARK LIVINGSTON, and
LORRAINE LIVINGSTON,
Plaintiffs,

v.

07-cv-1610

Electronically Filed

BOROUGH OF MCKEES ROCKS, and
OFFICER SHAWN BARGER,
Defendants.

**ORDER OF COURT DISMISSING ALL FEDERAL CLAIMS AND
REMANDING REMAINING STATE CLAIMS TO STATE COURT**

On June 4, 2004, Brandon Livingston, by his parents and guardians, Mark and Lorraine Livingston, and the parents in their own right, filed with this Court a civil rights law suit pursuant to 42 U.S.C. § 1983 (at Civil Action No. 04-840) against a number of defendants including the Borough of McKees Rocks, the McKees Rocks Police Department, Police Officer Shawn Barger, and K-9 Police Dog Dolpho. The lawsuit initially arose from an incident wherein Brandon was bitten by Dolpho, and for subsequent conduct on the part of defendants which they alleged to be racially discriminatory. There were other plaintiffs and other defendants raising various federal and state common law and statutory claims.

On August 18, 2006, this Court entered an Order (doc. no. 98) granting summary judgment in favor of all defendants against all, for the reasons set forth in the Memorandum Opinion of August 17, 2005 (doc. no. 97). Thus, all of plaintiffs' claims were dismissed except that judgment was not entered on the Livingstons' state common law and statutory claims arising from the dog bite incident. As to those claims, the Court dismissed the claims but "without prejudice to plaintiffs' right to pursue those claims in state court pursuant to 42 Pa.C.S. § 5103(b)

by filing the appropriate certifications” in the Court of Common Pleas of Allegheny County.

On or about October 27, 2007, the Livingston plaintiffs filed, in the Court of Common Pleas of Allegheny County, a Complaint against the Borough of McKees Rocks and Officer Barger raising state law claims stemming from the Dolpho incident, and also raising federal civil rights claims under 42 U.S.C. § 1983 that are strikingly similar to those previously dismissed by this Court. Defendants filed a Notice of Removal pursuant to 28 U.S.C. §1441 on November 26, 2007, and a Motion to Dismiss (doc. no. 6) on December 6, 2007, seeking to dismiss all of the claims, state and federal.

After careful consideration of the motion to dismiss, plaintiffs’ response thereto, and the briefs in support and in opposition, the Court will dismiss the federal claims and remand the state claims to state court, again.

As the United States Court of Appeals for the Third Circuit stated in Jean Alexander Cosmetics, Inc. v. L’Oreal USA, Inc., 458 F.3d 244, 250 (3d Cir. 2006):

The Second Restatement of Judgments articulates the general rule of issue preclusion as follows: “When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” Restatement (Second) of Judgments § 27 (1982).

There is no question that the federal claims plaintiffs are attempting to resurrect were finally litigated before this Court when it entered judgment on those claims against the plaintiffs in the previous lawsuit on August 18, 2005. This Court’s decision and the final judgment was affirmed in all respects on appeal, including the remand of the state claims to state court.

Livingston ex rel. Livingston v. Borough of McKees Rocks, 223 Fed.Appx. 84 (3d Cir. 2007).

Accordingly,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (doc. no. 6) is GRANTED. IT IS FURTHER ORDERED that the federal claims are DISMISSED with prejudice, and the Pennsylvania state law claims are REMANDED to the Court of Common Pleas of Allegheny County from whence they were removed.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: all counsel of ECF record